IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. PETER MASSINGA, Petitioner.	2 CA-CR 2009-0305-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052209

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Peter Massinga

Douglas
In Propria Persona

V Á S Q U E Z, Judge.

¶1 After a jury trial, petitioner Peter Massinga was convicted of second-degree murder, attempted first-degree murder, and three counts of aggravated assault. The trial court sentenced him to a combination of consecutive and concurrent, presumptive terms of imprisonment totaling thirty-four years. We affirmed his convictions and sentences on

appeal. *State v. Massinga*, No. 2 CA-CR 2007-0083 (memorandum decision filed Sept. 15, 2008).

¶2 Massinga filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. After appointed counsel notified the trial court he could find no arguable basis for Rule 32 relief, the court granted Massinga leave to file a supplemental petition. In the pro se petition that followed, Massinga argued the court had violated the prohibition against ex post facto legislation by requiring the state to prove, beyond a reasonable doubt, that Massinga had not acted in self-defense when he caused the death and other injuries alleged in the indictment. *See* A.R.S. § 13-205(A).

¶3 As Massinga pointed out, when he committed the offenses in 2005, § 13-205(A) had provided: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of . . . [title 13]." 1997 Ariz. Sess. Laws, ch. 136, § 4. According to Massinga, he was entitled to have his convictions and sentences vacated because his trial was erroneously conducted in accordance with the new law applicable to justification defenses, applied retroactively, instead of the law in effect when his offenses were committed. *See Garcia v. Browning*, 214 Ariz. 250, ¶ 1, 151 P.3d 533, 534 (2007) (amendments to § 13-205 "apply only to offenses committed on or after" their effective date). Massinga also alleged his right to a speedy trial was violated because he and his counsel had agreed to postpone his trial pending this court's ruling on whether the 2006 amendment to § 13-205(A) applied retroactively to defendants who, like Massinga, had been charged with offenses committed before the amendment took effect, but were still

awaiting trial. Finally, he alleged his trial counsel was ineffective in seeking retroactive application of the new law.

¶4 The trial court summarily dismissed the petition, finding (1) Massinga's allegations of trial error were precluded by his failure to raise them at trial or on appeal, and (2) his nonprecluded claims were not colorable. *See* Ariz. R. Crim. P. 32.6 (c) (court shall dismiss petition when "no [nonprecluded] claim presents a material issue of fact or law which would entitle the defendant to relief . . . and . . . no purpose would be served by any further proceedings"). With respect to Massinga's claim that trial counsel had been ineffective, the court wrote:

> Massinga has failed to affirmatively show that his trial attorney fell below an objective standard of reasonableness or that he was prejudiced by such conduct. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). The only assertion in the petition is that trial counsel permitted the court to give a self[-]defense instruction that placed the burden on the State to prove that he did not act in self-defense. The record is clear that this was a more favorable instruction than the one the court wished to give, that defense counsel was responsible for insuring that the more favorable instruction was given, and that the efforts by defense counsel on Petitioner's behalf were both admirable and successful. A defendant [who] has not been prejudiced by his attorney's conduct has not been denied effective assistance of counsel.

The court subsequently denied Massinga's motion for rehearing, in which he had argued his claim encompassed more than the self-defense instruction given the jury and maintained "his entire trial was tainted by the use of a new law which did not apply to his case."

¶5 In Massinga's petition for review of the trial court's rulings, he argues he was entitled to an evidentiary hearing to determine whether he "was deprived of a substantial procedural right available to him when he committed the offense" and whether trial, appellate, or Rule 32 counsel had been ineffective in failing to argue that application of § 13-205(A), as amended, violated the constitutional prohibition against ex post facto legislation. We review a trial court's denial of post-conviction relief for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶6 The trial court's order clearly and correctly applies the law, and we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). As the court found, Massinga's claims that he was subjected to ex post facto legislation and denied a speedy trial are precluded because he failed to raise those claims at trial or on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). Because Massinga contends he has stated colorable claims of ineffective assistance of trial counsel that are not addressed expressly in the court's order, we limit our further comments on review to those arguments.[1]

[1]We do not, however, address Massinga's claims of ineffective assistance of appellate or Rule 32 counsel because he did not allege these claims in his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.9(c) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that "have obviously never been presented to the trial court for its consideration"). Moreover, because a nonpleading defendant has no constitutional right to counsel in a Rule 32 proceeding, Massinga's claim of ineffective assistance of Rule 32 counsel is not cognizable under Rule 32. *See State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996).

¶7 To prevail on a claim that the assistance of counsel was constitutionally deficient, a defendant must show both that counsel's performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland*, 466 U.S. at 691-92; *Nash*, 143 Ariz. at 397-98, 694 P.2d at 227-28. "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6, 32.8. A colorable claim is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶8 In arguing he suffered "[a] landslide of prejudice" from trial counsel's conduct, Massinga may fail to appreciate the benefit he received by retroactive application of the amendment to § 13-205, which eliminated a defendant's burden of proving justification as an affirmative defense and requires the state to disprove, beyond a reasonable doubt, evidence that a defendant's actions were justified.[2] As another department of this court stated in *State v. Yellowmexican*, 142 Ariz. 205, 207, 688 P.2d 1097, 1099 (App. 1984), "There are two basic elements necessary for a criminal law to be *ex post facto*: (1) it must be retroactive—apply to events occurring before its enactment—and (2) it must disadvantage the offender affected by it."

[2]In his motion for rehearing, Massinga argued the application of § 13-205, as amended, was prejudicial because, "This is a case in which [Massinga] was hard[-]pressed to show he acted in self[-]defense. It was a much easier burden to show that [he] did not act in self-defense." We fail to understand this argument.

¶9 Because the amendment of § 13-205 was beneficial to Massinga, its application did not violate the prohibition against ex post facto legislation. *See Garcia*, 214 Ariz. 250, ¶ 19, 151 P.3d at 537 ("[N]othing in the United States Constitution or the Arizona Constitution prohibits applying [amended § 13-205] to defendants who committed their offenses before the effective date of the amendments; it is undisputed that the Ex Post Facto Clause is not implicated here."). Thus, we agree with the trial court that counsel's success in requiring the state to disprove Massinga's assertions of self-defense cannot have prejudiced Massinga.

¶10 But Massinga also appears to argue trial counsel's representation was affected in other, prejudicial ways by his decision to urge application of the newly amended law. Massinga notes counsel initially had filed a motion asking to present a surrebuttal argument at trial, premised on Massinga's burden of proving self-defense, but withdrew the motion after the state agreed the amended version of § 13-205 should apply. On this point, Massinga may not understand he was never entitled to a surrebuttal argument; rather, "whether to permit surrebuttal argument is a decision committed to the discretion of the trial court." *State v. Moody*, 208 Ariz. 424, ¶ 203, 94 P.3d 1119, 1163-64 (2004) (insanity defense; upholding trial court's denial of surrebuttal argument); *State v. Jensen*, 153 Ariz. 171, 180, 735 P.2d 781, 790 (1987) (same); *State v. Zimmerman*, 166 Ariz. 325, 329, 802 P.2d 1024, 1028 (App. 1990) (same).

¶11 Thus, to demonstrate prejudice, Massinga would need to show that, had his counsel not withdrawn the motion, there was both a reasonable probability the trial court would have granted a surrebuttal argument and, also, a reasonable probability the jury

then would have been persuaded to acquit him, despite an instruction, under the previous version of § 13-205, that Massinga bore the burden of proving self-defense. This is sheer speculation, not an allegation of facts that, if true, might have changed the verdict. *See Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173. Similarly, Massinga maintains his counsel "abandoned their strategy" of affirmatively proving Massinga acted in self-defense, but he offers no citation to the record to suggest counsel was deficient in presenting or arguing such evidence to the jury. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶12 Because we conclude the trial court correctly dismissed Massinga's petition on the ground he had failed to state a colorable claim for relief under Rule 32, Massinga has failed to sustain his burden, on review, of establishing the court's ruling was an abuse of discretion. *See* Ariz. R. Crim. P. 32.6(c). Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge